(51764)

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1580

ANTHONY B. CATALDO and ADA CATALDO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This refund suit arose from an assessment against petitioners for an income tax deficiency of $11,215.17 for 1964, which, with penalties and interest, came to a total assessment of $14,235.91. This assessment resulted from a determination that an additional $24,758.24 should have been included as income from petitioner-husband's law practice, and that petitioners were not entitled to $5,756.66 in claimed business expense deductions and $3,558.88 in various other de-

ductions. (R. 3-4, 8.)[1] On January 8, 1971, petitioners filed in the district court for the Southern District of New York an income tax refund suit seeking the return of a total sum of $1,338.04 which they claimed they had previously paid in partial satisfaction of this assessment. The complaint did not allege that the remainder of the assessment had been paid, and alleged that a refund claim had been filed as to only $200 of the sum paid. (R. 4, 9.) The government moved to dismiss the complaint on the ground that the complaint on its face showed that the court lacked subject matter jurisdiction, since no allegation had been made that the entire assessment had been paid, as is required under 28 U.S.C. 1346 and *Flora* v. *United States*, 357 U.S. 63, petition for rehearing granted, 360 U.S. 922, affirmed on rehearing, 362 U.S. 145. The district court dismissed the complaint (Pet. 14-15) and then denied petitioners' motion for relief under Rule 60(b), Fed. R. Civ. P. The Court of Appeals for the Second Circuit affirmed from the bench the judgment of the district court and later denied a petition for rehearing. (Pet. 24-25.)

The decision below is correct. There is no conflict or any other reason for further review.

In *Flora* v. *United States*, *supra*, p. 75, this Court stated what has come to be known as the "pay first and litigate later" principle, requiring full payment

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[1] "R." references are to the record appendix filed in the court of appeals.

by taxpayers of all income taxes prior to the filing of a refund suit. Since petitioners do not contend that they paid in full the assessed taxes, *Flora* bars the suit. That decision has been strictly followed in the federal courts, which have summarily disposed of refund suits in which the full deficiency has not been paid. *Miskovsky* v. *United States*, 414 F. 2d 954 (C.A. 3); *Martinon* v. *Fitzgerald*, 306 F. Supp. 922 (S.D. N.Y.), affirmed *per curiam*, 418 F. 2d 1336 (C.A. 2). The fact that petitioners allege (Pet. 9-10) that this is a "fraudulent" assessment and are attacking the motives of the auditors who prepared it does not make *Flora* inapplicable. Indeed, Section 1346(a)(1), which *Flora* applied, refers to a suit for the refund of a tax "alleged to have been erroneously or illegally assessed or collected"; this would also include taxes fraudulently collected, as charged herein. Petitioners' claim that their inability to pay the total sum relieves them of that prerequisite to a refund suit was also disposed of in *Flora*, 357 U.S. at 75, where this Court pointed out that taxpayer had the alternative remedy of appeal to the Tax Court without prior payment of the tax. Internal Revenue Code of 1954, Section 6213 (26 U.S.C.).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1972.

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